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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 779

JOSEPH PATERNO AND PASQUALE MASI,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ANTHONY A. CALANDRA,
Counsel for Petitioners.

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No. 779

JOSEPH PATERNO, AND PASQUALE MASI,
Petitioners-Appellants, Below,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee, Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Judges of the Supreme Court of the United States:

Your Petitioners respectfully represent:

I

Summary Statement of the Matter Involved

Petitioners, Joseph Paterno and Pasquale Masi, were convicted in the United States District Court for the Southern District of Florida, Jacksonville Division, for a conspiracy to possess and publish counterfeit money in denominations of twenty dollars, each in violation of Title

18, U. S. C. A., Section 265. The Petitioners were jointly indicted with Floyd C. Fallen, Herbert Crossley, G. Richard Van Dien, Jr., Jan Richard Knight, Chester Turner and James J. Roberts. Floyd C. Fallen pleaded guilty and testified for the Government. The defendant Turner by direction of the Court was acquitted and the defendant, Roberts, was a fugitive from justice at the time of the trial.

Petitioners Paterno and Masi were residents of the City of Newark, New Jersey. Petitioners Paterno and Masi were each sentenced to a term of seven years imprisonment and fined $5,000.00, and from this judgment and commitment the petitioners appealed the same to the United States Court of Appeals for the Fifth Circuit, which Court affirmed the conviction without opinion.

Counsel moved for judgments of acquittal at the end of the government's case and at the end of the entire case which motions were denied. Counsel submitted written requests to charge the jury, most of which were denied and others not substantially charged as requested.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States code, Section 347 (a); Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; (New Title 28 Section 1254) and Rule 37 (b) of the Federal Rule of Criminal Procedure, effective March 21, 1946.

III

Questions Presented

1. Whether or not Petitioners were conspirators as charged in the indictment. The evidence clearly showed that Petitioner Paterno merely sold counterfeit money to one Fallen and had no further interest in the contraband.

2. Whether the United States Court erred in denying Petitioners motions for judgments of acquittal.

3. Whether the United States District Court for the Southern District of Florida, Jacksonville Division had jurisdiction.

4. Whether the Court erred in the charge to the jury as to the failure of Petitioners to testify in their own behalf.

5. Whether the Court erred in refusing to charge the jury that the indictment was not evidence of guilt.

6. Whether the Court erred in refusing to charge the jury as requested relating to the principle of law that there cannot be a conspiracy between a buyer and seller of contraband, if the facts so convince the jurors.

7. Whether the Court erred in denying motion for mistrial made during the summation of government counsel.

IV

Statement of Case

A brief analysis of the testimony given by each of the witnesses for the Government will give to this Honorable Court the evidence upon which the Government relied to sustain the indictment.

A. B. Wentz, an agent of the Secret Service, stationed at Atlanta, Georgia, testified that on or about September 25th, 1947, the defendant James J. Roberts delivered to him $8,460.00 in counterfeit bills of twenty dollars denomination (R., p. 16).

Louis O. Padgett, Supervising Agent of the United States Secret Service, testified that on October 11, 1947, he talked with the defendant Jan Richard Knight at Spartanburg, South Carolina, who had there been arrested with a supply of counterfeit twenty dollar bills found in his possession

(R., p. 31). That Knight made a written confession wherein he stated that he met Floyd C. Fallen in Jacksonville, Florida, together with the defendant Roberts and that Fallen asked Knight if he and Roberts wished to dispose of counterfeit monies for Fallen who would sell these monies to Knight for forty cents on the dollar (R., p. 35). That Fallen said to him that he had paid good money for this counterfeit money and that he was going to have it doctored up so that he would not lose money on it (R., p. 36). That Knight did not pass any of the money until he got to Spartanburg (R., p. 38). This witness further testified that he talked with the defendant Van Dien and that Van Dien had admitted to him that he was passing the counterfeit monies on a percentage basis and that the man he got it from told him that he paid twenty to twenty-two cents on the dollar for it (R., p. 50).

Alfred D. Collins, Jr. testified that Floyd C. Fallen told him that he knew a person with whom he could make connection to obtain counterfeit money and as a result loaned Fallen $2,500 (R., pp. 64, 65). That he again met Fallen who told him that he had left the money in New York and that he had to put it up in order to get the counterfeit money as he had to pay for it and go back after it later (R., p. 65). That Fallen said he had left the money there (meaning Newark) to pay for it (R., p. 66).

R. M. McDavid, an agent of the United States Secret service, testified that he picked up counterfeit twenty dollar bills in Miami, Florida (R., pp. 78, 79) and that he followed Floyd C. Fallen who was known to have handled this particular type of counterfeit money (R., pp. 79, 80). That he observed Floyd C. Fallen delivering to Alfred D. Collins, Jr., $7,744 in value of counterfeit money (R., p. 80). That the arrest of Fallen was by pre-arrangement with Collins (R., p. 80) on November 13th, 1947 at a tourist cabin (R., p. 80).

Floyd C. Fallen, a co-defendant, who pleaded guilty to the instant indictment (R., p. 85), testified that he knew all of the defendants on trial. That in February or March, 1947 he met the defendant Crossley (R., p. 87) and that at that time Crossley made a remark to him that he could get anything printed including counterfeit money (R., p. 88). At some time around July 1st, 1947, while in Atlanta Fallen discussed the question of counterfeit money with Crossley (R., p. 89). That Fallen and Crossley with their respective wives went on a vacation trip to Canada and that Crossley gave him a telephone number to call whenever he went to Newark and that the telephone number given to him was that of the appellant Joseph Paterno (R., p. 90). That subsequently Crossley and Fallen took an airplane trip to Newark, New Jersey, and while they were at the Sheridan Hotel, in Newark, New Jersey, Crossley called Paterno on the telephone and Paterno came to the hotel and spoke with them (R., p. 91). That later that evening Fallen, Crossley and Paterno discussed counterfeit money (R., p. 92). That Paterno informed them that he did not know if he could get the counterfeit money and would let them know that next day (R., p. 92). That during the discussion a price of twenty-two cents on the dollar was mentioned and that Paterno mentioned that the cost would run about twenty-two to twenty-three cents on the dollar (R., p. 93). The next afternoon they met at the Sheridan Hotel bar and discussed the price again and Paterno stated that he would phone to see if he could get a lower price and was unable to do so (R., p. 93). That Crossley dickered with Paterno on the price and that Paterno informed them that he could get the counterfeit money within a few days (R., p. 93). That while Crossley and Fallen were talking with Paterno, Crossley made a telephone call to a Mrs. Paul Lombardino (R., p. 95) and that the purpose of this call by Crossley was to get in touch

with someone else who might be able to furnish counterfeit money (R., p. 96). That Crossley and Fallen returned to Atlanta (R., p. 96). That subsequently in August 1947 Fallen and Crossley and their wives made another trip by airplane to Newark (R., p. 97). That Fallen did not get the counterfeit money because it wasn't ready (R., p. 97). That while on this trip Fallen and Crossley talked with Paterno and were introduced to the appellant Pasquale Masi (R., p. 97). That Fallen and Crossley again discussed the counterfeit details on this trip and that Paterno said that he was having a hard time getting the ink dried and that the money would not be ready for a few days (R., p. 98). That no conversation was had with Paterno and Masi at the same time that Fallen discussed the counterfeit money with Crossley and Paterno although they (Fallen and Masi) did discuss a counterfeit deal separately (R., p. 98). Fallen testified further that he had made two trips up to Newark to get the counterfeit money and that he was disgusted and told Masi what Paterno said to him about the ink not being dry (R., p. 99) and that Masi gave him the impression that the printer was drunk and that he, Masi, could print them himself, if necessary (R., p. 99). That on one of the trips Fallen gave to Paterno a deposit of $1,000 on account of the counterfeit notes which Paterno said was to go to the printer (R., p. 100). That several days after making this deposit Fallen called Paterno on the telephone and asked him to return the $1,000 deposit which Paterno did (R., p. 100). That as a result of a telephone conversation between Fallen and Paterno, Paterno was to call Fallen to let him know when he was to have the counterfeit money for him (R., p. 100). Subsequently, while Fallen was in Atlanta, Georgia, Crossley called him on the telephone and said that the counterfeit money was ready (R., pp. 100, 101). That Fallen then called Paterno on the telephone and Paterno told him that the money was ready (R., p. 101).

That several days later Fallen came to Newark, New Jersey and took with him $12,500 or $13,000 on his trip to Newark (R., p. 103). That he had no further conversation with appellant Masi (R., p. 104). When he arrived in Newark he telephoned the appellant Paterno and he was met at the airport by Paterno and Masi (R., p. 105). That when they arrived at the Regent Hotel in Newark Paterno showed Fallen a sample $20.00 note and Masi was not present at this time (R., p. 105), as the sample note was shown to Fallen in the bathroom. The following day Fallen sent Masi to buy a brief case for him (R., p. 107). Sometime later Paterno met him at the Regent Hotel, Newark, New Jersey, and in the brief case was contained the counterfeit money (R., p. 108). Masi was not present (R., p. 108). That Fallen and Paterno were in a green Buick automobile which Paterno was driving (R., p. 109). That he paid Paterno that night $11,000 and obtained therefore $50,000 in counterfeit money (R., p. 109). That thereafter Paterno drove Fallen to the Newark Airport and left him (R., p. 110). Fallen further testified that his destination from the Newark Airport was Spartanburg, South Carolina, to pick up his own plane so that he could go on his way to Jacksonville, Florida (R., p. 113). That he made a stop in Savannah, Georgia and called the defendant James J. Roberts at Tifton, Georgia on the telephone (R., p. 113). Fallen then proceeded to Jacksonville and conversed with the defendants Knight and Roberts to whom he gave $5,000 in counterfeit notes to pass on the percentage basis (R., p. 115). That Fallen was to get seventy-five percent and Knight and Roberts were to get twenty-five percent (R., p. 115). That on or about September 22nd, 1947, while Fallen was in Atlanta, Georgia he contacted the defendant Richard Van Dien and Crossley (R., p. 115). That Van Dien said he wanted to make some money and Fallen asked Van Dien to pass some counterfeit money on a percentage basis and

that he gave Van Dien $1,500 worth of the counterfeit money (R., pp. 116, 117). That while in Atlanta, Georgia he met with appellant Crossley and showed Crossley some of the twenty dollar notes and together they went to Cornelia, Georgia to see a contact of Crossley's to take some of these counterfeit bills (R., p. 117). That Crossley went to see the man, talked with this person, who said he would let Crossley know the next day as to whether he could use the counterfeit bills or not (R., p. 119). The next day Crossley told him that the man could not use the twenty dollar note because it was not of good quality (R., p. 119). That on or about September 27, 1947, Fallen sent by airplane to Paterno a package containing $25,000.00 worth of the counterfeit money, packed in a black bag (R., pp. 119, 120). That he mailed this package to Paterno as the result of a telephone call that Fallen made to Paterno informing him that he was returning the counterfeit bills because they were not any good and that Paterno said that he could get him a little better quality later on (R., p. 121). That Fallen sent these notes back to get new counterfeit notes in their place (R., p. 123). Fallen did not get back any part of the $11,000 which he originally had paid to appellant Paterno (R., pp. 123, 124). That sometime later Fallen was in the Fire Chief Cabin in Florida where he was to give Collins $7,420 in counterfeit notes and that he was arrested by the Secret Service Agents at this time (R., p. 127).

On cross examination Fallen re-affirmed that he paid $11,000 in good United States currency to Joseph Paterno for $50,000 in counterfeit money (R., p. 133). That, as an accommodation to Fallen, Joseph Paterno drove him to the airport the night he received the money (R., p. 134). Further, that the $11,000 which he paid to Paterno was given his own individual money and that Crossley had no interest in it (R., p. 136). That Fallen had given to Crossley

$40.00 in counterfeit money as a sample to be taken to Cornelia, Georgia (R., p. 138) and that none of the genuine money that Fallen paid to Paterno belonged to Crossley (R., p. 138). That there was no agreement between Fallen and Crossley about splitting any fees or anything and that he was just to accommodate Crossley by bringing money back to Crossley for his (Crossley's) own contact (R., p. 139). That after he received the return of the $1,000 deposit from Paterno that Fallen just more or less let the matter die because he figured it was a buildup and "was not coming off" (R., p. 141). That Knight did not have any connection with the New Jersey people (R., p. 143) and that Van Dien and Knight knew nothing about the origin of the money in Newark, New Jersey and that the parties in Newark, New Jersey, did not know Van Dien or Knight (R., p. 144).

Robert M. Hancock, an agent of the United States Secret Service, testified that he was stationed in Atlanta and had two conversations with the defendant Crossley (R., p. 150). That on the second conversation, March 3rd, 1948, he spoke with Crossley in Atlanta and that Crossley told him that he had done a lot of crooked things in his life but that he wouldn't mess with narcotics and counterfeit (R., p. 153). That Crossley told him that he and Fallen went on business to buy smuggled diamonds (R., p. 154).

On cross examination Hancock testified that Crossley had said that he was a crook all his life but there were three things he wouldn't bother with and that was narcotics, cars and counterfeit money and that the purpose for his visit to Newark was to buy smuggled diamonds and not counterfeit money (R., pp. 155, 156).

Monroe M. Varden testified that he was the manager of the Rutledge Hotel in Newark, New Jersey and that Joseph Paterno lived at this hotel with his wife and that telephone calls were charged to Joseph Paterno as being made to

Jacksonville, Florida and other places in Newark, New Jersey.

Ellsworth Joseph Braun testified that he was the manager of the Sheridan Hotel, Newark, New Jersey, and that a room was registered in this hotel in the name of Mr. and Mrs. Herbert Crossley on August 7th, 1947, and rooms also registered in the name of Floyd C. Fallen at this hotel (R., p. 179).

Wendell Cannon Moore testified that he was employed by the Western Union Telegraph Company in Jacksonville, Florida, and that on August 26th, 1947, a money order in the amount of $1,000 was sent to Floyd C. Fallen by Joseph Paterno of the Rutledge Hotel, Newark, New Jersey (R., p. 182).

Robert M. Baumgardner testified that he was employed by the National Air Lines in Jacksonville, Florida and that a package was sent air mail by one R. S. Parks to Joseph Paterno in Newark, New Jersey.

Donald O. Kerkow testified that he was employed by the National Airlines and that in September 1947 he was representing his company in Newark, New Jersey. That there was some difficulty in delivering the package which was sent from Jacksonville Florida, and that the bill contained the signature of Joseph Paterno as having received the package (R., p. 191).

H. E. Mayfield testified that he was Office Manager for Southern Bell Telephone Company at Atlanta, Georgia and that a telephone was listed in the name of Mrs. A. M. Crossley at her residence and that a number of long distance telephone calls were made between this number and Jacksonville to the home of Mrs. Floyd C. Fallen (R., pp. 195-203) and other places.

Aloysius J. Bittig testified that he was an attorney for the New Jersey Bell Telephone Company and identified telephone calls from the Hotel Rutledge and Hotel Sheri-

dan to Atlanta and also telephone calls from the Hotel Regent to Columbia, South Carolina and from the Hotel Regent to Jacksonville, Florida (R., pp. 203-212).

R. C. McCurry testified that he was the manager of the Ansley Hotel in Atlanta, Georgia and that Fallen registered at this hotel and made several telephone calls to Tifton, Georgia, Jacksonville, Florida and to Newark, New Jersey (R., pp. 213-216).

Thomas Bunanno testified that he operated the Regent Hotel in Newark, New Jersey and identified telephone records of telephone calls made from his hotel to Tifton, Georgia by Fallen (R., pp. 216-222).

Ernest O. Rickets testified that he was the manager of the Southern Bell Telephone and Telegraph Company in Jacksonville, Florida and that there were telephone calls made from that city to Joseph Paterno at the Rutledge Hotel, Newark, New Jersey and also calls made to Tifton, Georgia and to the Regent Hotel where Fallen was registered on September 19th, 1947 (R., pp. 222-228).

Defendant's Case

None of the petitioners testified in their own behalf but defendant Crossley in his own behalf called as a witness the Hon. J. J. Spikes, Judge of the Municipal Court at La Grange, Georgia. He testified that he knew Floyd C. Fallen, the co-defendant, and that the reputation of Fallen for truth and veracity was bad and that he would not believe Fallen under oath (R., p. 242).

V

Statutes Involved

As the construction of statutes of the United States are not involved in this application for a writ of certiorari we deem it unnecessary to set forth the statutes upon which the indictments are based.

VI

Reasons for Allowance of Writ

The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decision of the Supreme Court and other courts of Appeal in the cases of the *United States* v. *Katz,* 271 U. S. 354; *United States* v. *Gebardi,* 287 U. S. 112; *United States* v. *Peoni,* 100 Fed. (2d) 401; *United States* v. *Koch,* 113 Fed. (2d) 982; *Lambert* v. *United States,* 101 Fed. (2d) 960; *United States* v. *Simonds,* 148 Fed. (2d) 177; *Brandenberg* v. *United States,* 146 Fed. (2d) 878, *West* v. *United States,* 113 Fed. (2d) 168; *United States* v. *New York Central Railroad* 140 Fed. 298; *Zeulli* v. *United States,* 137 Fed. (2d) 845, and many others relating to the principle of law that where the facts show that the sole arrangment between the parties is that of buyer and seller, that the crime of conspiracy was not committed by the seller of the contraband. It was the duty of the trial court to grant petitioners motions for judgment of acquittal.

The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decision of this court and other courts of Appeal in the cases of *Bruno* v. *United States,* 308 U. S. 287; *Mayer* v. *United States,* 259 Fed. 216; *United States* v. *Pendergast* 32 Fed. 198, wherein the trial court was duty bound to charge the jurors that petitioners failure to take the stand and testify in their own behalf that the jury should draw no inference of guilt therefrom.

The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decision of this court and other courts of Appeal in the cases of *Little* v. *United States,* 73 Fed. (2d) 861; *Capriola* v. *United States,* 51 Fed. (2d); *Cooper* v. *United States* 9 Fed. (2d) 216; *Gold* v. *United States,* 102 Fed. (2d) 350, *United States* v. *Shanerman,* 150 Fed. (2d) 941; *Sunderland* v. *United States,* 9

Fed. (2d) 202, and many others wherein it was substantial and harmful error for the court to refuse to charge the jury that the indictment was not evidence of guilt.

The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decision of this court and other courts of appeal in the cases of *Bruno* v. *U. S.*, 308 U. S. 287, 293; *McAfee* v. *U. S.*, 105 Fed. 2nd 21, 26; *Kinard* v. *U. S.*, 96 Fed. 2nd 522, 524; *Stassi* v. *U. S.* 50 Fed. 2nd 526, 528; *Krein* v. *U. S.*, 11 Fed. 2nd 722, 731; *Peoni* v. *U. S.*, 100 Fed. 2nd 401; *Falcone* v. *U. S.* 311 U. S. 143; *Quick* v. *U. S.*, 38; *Morris* v. *U. S.*, 156 Fed. 2nd 891; *Binn* v. *U. S.*, 328 U. S. 633 wherein it was the duty of the trial court to instruct the jurors when requested so to do the principles of law applicable to the case. The trial court was requested to instruct the jurors if they found from a consideration of all of the evidence that petitioner Paterno merely sold the counterfeit monies to Fallen and was not to share in the profits that petitioner was not a co-conspirator. The trial court refused to so instruct the jurors.

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the decisions of other appellate courts in the cases of *Hyde* v. *U. S.*, 255 U. S. 347; *Ladner* v. *U. S.*, 168 Fed. 2nd 771; *Davis* v. *U. S.*, 148 Fed. 2nd 203 and many others relative to the jurisdiction of the trial court to try petitioners on an indictment where the venue has been improperly laid.

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the decisions of this Honorable Court and other appellate courts in the cases of *Vierick* v. *U. S.*, 318 U. S. 236; *Berger* v. *U. S.*, 295 U. S 78, 88; *Ward* v. *U. S.*, 96 Fed. 2nd 189; *Pierce* v. *U. S.* 86 Fed. 2nd 949; *Minker* v. *U. S.*, 85 Fed. 2nd, 425; *Taliaferro* v. *U. S.*, 47 Fed. 2nd 699; *Sunderland* v. *U. S.* 19 Fed. 2nd 202; *U. S.* v. *Sprengle*, 103 Fed. 2nd 876, 884, in that summation of the district attorney was so highly inflammable and beyond

the province of proper comment as to prejudice the jurors against the petitioners and the trial court should have granted petitioners' motion for a mistrial.

Manifestly, therefore, the decision below because of the conflicts in the rulings in the various Circuit Courts of Appeal, particularly with reference to the question as to whether there can be a conspiracy between a seller and buyer of contraband, this Honorable Court should clarify the law by the authoritative decision of this Court.

The Petitioners, therefore, respectfully submit that their Petition for a Writ of Certiorari should be granted.

JOSEPH PATERNO,
PASQUALE MASI.

ANTHONY A. CALANDRA,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 779

JOSEPH PATERNO, AND PASQUALE MASI,
Petitioners-Appellants, Below,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee, Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The decision of the United States Court of Appeals for the Fifth Circuit appears in the record submitted herewith. No opinion was filed by said learned court but merely an affirmation of the conviction below.

II

Statement of the Case

A full statement of the case is included in the preceding Petition under Point IV.

III

Argument

Point I

The learned Trial Court erred in denying Petitioners motions for judgments of acquittal.

The indictment in this cause charged the petitioners and others with a conspiracy in the United States District Court, Southern District of Florida, Jacksonville Division, to possess, control, publish and utter counterfeit obligations and writings of the United States of America, to wit, $20.00 bills for the purpose of defrauding the United States.

A reading of the indictment and the overt acts therein charged (R., pp. 7-11) show (Overt Act 1) that Floyd C. Fallen in Duval County, Florida, possessed $7,420 in counterfeit bills at the time of his arrest; (Overt Act 2) that defendant Crossley and Fallen came to Newark, New Jersey to meet Petitioner Joseph Paterno and converse with reference to the purchase of counterfeit money; (Overt Act 3) that Crossley with Fallen made a second trip to Newark, New Jersey and met Petitioners Paterno and Masi and again conferred with reference to the purchase of counterfeit money and that Fallen gave Paterno a deposit of $1,000 for the delivery of $50,000 worth of counterfeit notes; (Overt Act 4) that in September 1947 Fallen came to Newark, New Jersey met Petitioners Paterno and Masi and that Petitioner Paterno delivered to Fallen $50,000 in counterfeit currency; (Overt Act 5) that on September 17th, or 18th, 1947 co-defendants Roberts and Knight in Jacksonville, Florida each received $5,000 worth of counterfeit money to pass on a percentage basis.

The indictment as framed charges a conspiracy to deal in counterfeit money, the common object of which was to distribute the same within the jurisdiction of the United

States District Court for the Southern District of Florida, Jacksonville Division. The evidence against the petitioner Paterno clearly and distinctly showed the relationship of buyer and seller between Paterno and Fallen. There was no evidence to prove that petitioner Paterno was in anywise interested, concerned or informed as to what use Fallen would make of the counterfeit money purchased. There was no evidence to show that Paterno was in anywise the partner of Fallen or any of the other defendants named in the indictment or that he had any interest in anything that Fallen would do with the counterfeit money after it was purchased from Paterno.

So that this Honorable Court may have the benefit of all of the evidence adduced as to each of the petitioners we will set out the evidence in the case as it applies to each of the petitioners, as follows:

A. Evidence Against Petitioner Joseph Paterno

In July 1947 co-defendant Floyd C. Fallen came to Newark, New Jersey with defendant Herbert Crossley and Fallen was introduced to Paterno and a conversation was had whereby Fallen wished to purchase counterfeit money (R., pp. 91, 92). That a price was fixed for the counterfeit money of twenty-two cents on the dollar (R., p. 93), and that Crossley dickered with petitioner Paterno on the price (R., p. 93). That Paterno said he would endeavor to get this counterfeit money but was uncertain (R., p. 93) and in the meanwhile petitioner Crossley called on the telephone another person, Mrs. Paul Lombardino (R., p. 95), who might be able to furnish the counterfeit money. Subsequently, in August 1947, Fallen came to Newark, New Jersey, met petitioner Paterno and gave him a deposit of $1,000 on account of the purchase of the counterfeit money (R., p. 100). That several days later, at the request of Fallen, Paterno returned this deposit to Fallen. That in September

1947 Fallen came to Newark, New Jersey, met Joseph Paterno, paid him $11,000.00 in good United States currency and obtained therefor $50,000 worth of counterfeit notes in $20.00 denominations (R., p. 109). That as an accommodation to Fallen, Paterno drove Fallen to the Newark Airport (R., p. 134). and that Fallen had no arrangement to split any fees with Crossley (R., p. 139). That in the latter part of September 1947 Fallen, using an assumed name, returned about $25,000 worth of the counterfeit money because it wasn't of a good quality and that Paterno received this package (R., pp. 119-120). That Fallen received nothing in return, excepting that Paterno was to give him other counterfeit currency of a better quality to replace the returned counterfeit money (R., pp. 121, 123).

B. Evidence as to the Petitioner Pasquale Masi

Fallen testified that on one occasion when he came to Newark, New Jersey to discuss delivery of the counterfeit money he met Masi with Paterno (R., p. 97) and that Fallen, Paterno and Masi never discussed counterfeit money when the three were together (R., p. 98). However, on the occasion of one of Fallen's visits to Newark he complained to petitioner Masi that Paterno was not getting him the counterfeit money and that petitioner Masi had said that probably the printer was drunk and, if necessary, Masi could print the counterfeit money (R., p. 99). On the last visit of Fallen to Newark, Fallen sent Masi to purchase a brief case for him (R., p. 107). There was no further testimony relating to any dealings between Masi and Fallen with reference to the particular counterfeit in question but merely the conversation related here.

The relationship between the petitioner Paterno and Fallen distinctly shows a buyer and seller relationship. There is no evidence or proof whatsoever of any agreement

or combination between Paterno and Fallen which had as its object the distribution of counterfeit money on a percentage basis anywhere in the country. In corroboration of Fallen's testimony that he was a purchaser of counterfeit money the government witness Collins testified that he had loaned Fallen $2,500.00 to make a purchase from somebody up in New York (R., pp. 62, 64, 65). That Fallen had told him that he had left the money there in order to buy it (R., p. 66). This is further corroborated by examination of the testimony given by Louis O. Padgett, Supervising Agent of the United States Secret Service, who obtained a signed confession from the co-defendant Knight and reading from the confession Fallen had told Knight that he had paid good money for this counterfeit money and that he was going to have it doctored up so that he would not lose money on it (R., p. 36). Incidentally, Fallen testified that Knight did not have any connection with the New Jersey people (R., p. 144), and that defendants Van Dien and Knight knew nothing about the origin of the money in Newark, New Jersey, and that the parties in Newark, New Jersey did not know Knight and Van Dien (R., p. 144). The transaction relating to the counterfeit money in question was an independent transaction between petitioner Paterno and Fallen. Fallen, co-defendant and a Government witness, testified that he was disposing of the counterfeit money through Van Dien and Roberts and Knight on a percentage basis (R., pp. 115, 116, 143). If petitioner Paterno were to participate in the distribution and profits, Fallen would have so testified and the government had the duty of proving that Paterno participated in the conspiracy that he knew and understood absolutely the object thereof and that his participation could consist of either active distribution of the money or participation in such profits as Fallen would have realized through the sale by his agents on a percentage basis.

In *Zeulli* v. *U. S.*, 137 Fed. (2) 845, the Second Circuit Court of Appeals held:

> "If a crime necessarily involves mutual cooperation of two persons and if they have in fact committed the crime they may not be convicted of a conspiracy to commit it." U. S. *vs.* Sager, 49 Fed. (2) 725, 727, 728; U. S. *vs.* Dietrich, 126 Fed. 664; U. S. *vs.* Katz, 271 U. S. 354, 355; Gebardi *vs.* U. S., 287 U. S. 112, 122.

If petitioner Paterno committed a crime he committed substantive offenses in the possession and uttering of the $50,000 worth of counterfeit money in New Jersey. The transaction was an *independent one,* without any contingencies or understanding other than a direct sale of $50,000 worth of counterfeit money for $11,000 of good United States currency. The circumstances are clear. Fallen's first visit established the price of twenty-two cents on the dollar of counterfeit money. On his third visit he purchased $50,000 worth of counterfeit money for $11,000.

As to the petitioner Paterno the law has been established that there cannot be a conspiracy between a buyer and a seller. The leading case in the United States on the question is *U. S.* v. *Peoni,* 100 Fed. (2) 401 (2 C. C. A.). We deem it advisable to relate the facts in the *Peoni* case and compare them with the evidence against petitioner Paterno in order to emphasize and point out that the facts against Paterno are in point and exactly the same as in the *Peoni* case.

Peoni was indicted in the Eastern District of New York upon three counts for possessing counterfeit money and upon one count for conspiracy to possess it. He was convicted on all counts and the question raised was the sufficiency of the evidence to sustain the verdict. In the Borough of the Bronx (New York) Peoni sold counterfeit to one Regno; and Regno sold the same bills to one Dorsey, also

in the Bronx. All three knew that the bills were counterfeit and Dorsey was arrested while trying to pass them in the Borough of Brooklyn. (The Borough of Bronx is in the jurisdiction of the Southern District of New York and the Borough of Brooklyn is in the jurisdiction over matters occurring in the respective Boroughs.)

The question was whether Peoni was guilty as an accessory to Dorsey's possession, and whether he was a party to the conspiracy by which Dorsey should possess the bills. The argument of the prosecutor was that as Peoni put the bills in circulation and Regno would be likely not to pass them himself but to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni's original act, with which he might be charged.

On the above state of facts the Court at page 402 held:

> "That Peoni was not an accessory to Dorsey's possession; his connection with the business ended when he got his money from Regno, who might dispose of the bills as he chose; it was of no moment to him whether Regno passed them himself, and so ended the possibility of further guilty possession or whether he sold them to a second possible passer. His utterance of the bills was indeed a step in the casual chain which ended in Dorsey's possession, but that was all. Perhaps he was Regno's accessory. Rudner *vs.* U. S. 6 Cir., 281 F. 516, and Anstess *vs.* U. S. 7 Cir., 22 Fed. (2) 594, do indeed hold that a seller, knowing the buyer's criminal purpose, is a conspirator with him. On the other hand in Rex *vs.* Lomas, 22 Cox's Cr. Cas. 765, the court acquitted the accused who had given back to a burglar a jimmy which the burglar lent him, though he knew the burglar would use it to commit the crime; Lord Reading saying that in such cases advice or procuring was a necesary element. Moreover, the law is at least unsettled whether action for the price will not lie, though the seller knows that the buyer means to use

the goods to commit a crime, Williston, sect. 1754, and in perhaps the leading case, Graves *vs.* Johnson, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355 the seller recovered. Be that as it may, nobody so far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that buyer will use the goods unlawfully, but that some one further down the line may do so. Nor is it at all desirable that the seller should be held indefinitely. The real gravamen of the charge against him is his utterance of the bills; and he ought not to be tried for that wherever the prosecution may pick up any guilty possessor—perhaps thousands of miles away. The oppression against which the Sixth Amendment is directed could be easily compassed by this device, because if the seller be a real accessory he may be removed to the place of the crime. Hoss *vs.* U. S. 8 Cir., 232 F. 328, 335; U. S. Littleton, D. C., 1 Fed. (2) 751." (Italics supplied.)

"The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed to be supposed that, once some kind of criminal concert is established all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remain in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution

of the concert of which the accused is privy, though that doctrine too is often abused." (Italics supplied.)

"Conviction reversed; accused discharged."

Comparing the evidence against Paterno with the facts in the *Peoni* case the same reasoning would apply. After Paterno sold the $50,000 worth of counterfeit bills to Fallen for the sum of $11,000 paid in Newark, New Jersey, he had no further connection with the disposal of or the use to which the counterfeit money would be put. Paterno had no concern with the counterfeit bills after Fallen paid him. Fallen did not testify that Paterno was to share in any profits that Fallen might make as a result of his passing of the bills himself or through others. Fallen did testify that he gave quantities of the counterfeit money to Roberts, Knight and Van Dien for them to sell on a percentage basis for Fallen. There was no evidence that Paterno knew what Fallen would do with the counterfeit money after he purchased it. Fallen admitted that Paterno was not to split anything with Fallen after he had purchased the counterfeit bills. It was the apparent object of Fallen to make a profit on his purchase from Paterno and use as the means therefor to conspire with Van Dien, Roberts and Knight to sell the bills on a percentage basis. The common object of the conspiracy was the disposal and profit sharing in these bills. There was no such agreement and understanding with Paterno so that the *Peoni* case is exactly in point on the facts and the principle of law established by the Second Circuit.

Paterno was not the accessory of Fallen in the possession and utterance of the counterfeit bills. There was no evidence showing that petitioner Paterno knowingly associated himself in the common object and enterprise of Fallen, Crossley, Roberts, Van Dien and Knight to pass the counterfeit money in Florida, Georgia and South Carolina. There

was no evidence to show that petitioner Paterno had more than the single transaction with Fallen pertaining to counterfeit money. The sale by Paterno to Fallen was an *independent, single transaction* without any agreement or understanding as to what Fallen or any of his agents might do with the counterfeit bills.

In *U. S.* v. *Koch*, 113 Fed. (2) 982, 2nd Cir., Koch and others were tried and convicted upon an indictment charging him and four other named persons and others unknown to violate the statutes relating to narcotic drugs. The only evidence which connected the appellant Koch with the conspiracy was that one Mauro who had received the cocaine from one Celli; that he, Koch, met Mauro on the street inquiring if he had some cocaine which he wanted to sell and agreed to buy 170 ounces thereof at an agreed price of $25.00 per ounce. The agreement of sale provided for the delivery of the cocaine at Mauro's house to one Kobach, who would be sent for it by the appellant and that payment for the cocaine would be made within two or three days. The appellant sent Kobach for the cocaine as agreed and Mauro delivered it to him in six cans. A few days after that Mauro met Koch, appellant, and Kobach. The appellant then told Mauro that he was having trouble because the cocaine "did not show good" and requested Mauro to take some of it back, Mauro agreed provided what was returned was the same that he had delivered to Kobach and they would meet again in several days. Several days later they did meet and appellant paid Mauro the agreed price for seventy ounces, which he apparently had sold and at the same time returned seventy-five ounces.

One of the many issues raised at the trial was whether or not the evidence was sufficient to prove that Koch knowingly joined the conspiracy to import and dispose of the narcotics. The amount of the cocaine purchased would, of course, indicate that it was taken not for personal con-

sumption alone but for resale. It does not appear that Koch was a steady purchaser from the conspirators so that it could not be inferred that he knew of the conspiracy and was acting to further its ends rather than exclusively his own.

The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought the cocaine at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant's conspiracy with Mauro and those who were his co-conspirators. *Dickerson* v. *U. S.*, 8 Cir., 18 Fed. (2) 887. It was necessary to the Government's case to show that the appellant Koch was in some way knowingly associated in the unlawful, common enterprise to import the drugs and dispose of them unlawfully. *U. S.* v. *Peoni*, 100 Fed. (2) 401; *Muyers* v. *U. S.*, 9 Cir., 89 Fed. (2) 784.

Again we find a similarity of facts with the Paterno case excepting that Koch appears in the category of a buyer from Mauro with the assistance of Kobach, an apparent messenger for Koch. The principle of law established in the *Koch* case is applicable to Paterno. Paterno and Fallen *had no joint interest.* Fallen bought at a stated price and was under no obligation to Paterno excepting to pay him that price. The sale by Paterno was insufficient to prove Paterno a conspirator with Fallen or any of the other defendants.

The evidence shows that after Fallen had purchased the counterfeit money from Paterno, he (Fallen) organized, planned and schemed a method by which he was to distribute and dispose of the counterfeit money. He obtained the services of Roberts, Knight and Van Dien and on one occasion used the appellant Herbert Crossley in an endeavor to dispose of some of these bills in Cornelia, Georgia.

The law as to what constitutes one a co-conspirator or an aider and abettor was settled in *Falcone et als.* v. *U. S.*, 109 Fed. (2) 579, 2nd Cir.

> Falcone and others were convicted of a conspiracy to operate an illicit still. The evidence against Falcone disclosed that in 1937 he sold sugar to a number of grocers who in turn sold to the distillers. He was jobber in Utica, New York. Some of the bags of this sugar were found by Federal Agents who raided the stills and Falcone was seen on one occasion assisting and delivering the sugar to one of the purchasers, Bonomo, when the truck arrived. It appears that Falcone's business in sugar was far greater while the stills were active than either before they were set up, or after they were seized and the court assumed that the evidence was enough to charge him with notice that his customers were supplying the distillers.

On the above facts the Second Circuit Court held as follows:

> At page 581 "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome."
>
> The Court held that "the seller of goods does not become a conspirator or an abettor merely because he does not refrain from selling goods which he knows the buyer intends to use in committing a crime, but he must in some sense promote the venture himself, make it his own, or have a stake in its outcome, before he is guilty as a conspirator or an abettor."
>
> "Conviction reversed."

The Government appealed the Falcone reversal from the Second Circuit to the Supreme Court of the United States (311 U. S. 143), and the reversal was affirmed.

Comparing *U. S.* v. *Bruno*, 105 Fed. (2) 921, 2nd Cir., (reversed on another point 308 U. S. 287); *U. S.* v. *Brandenberg*, 146 Fed. (2) 878; *U. S.* v. *Simonds*, 148 Fed. (2) 177, (2 C. C. A.); *Lott* v. *U. S.*, 205 Fed. 28 (9 C. C. A.); *Norris* v. *U. S.*, 34 Fed. (2) 839 (3 C. C. A.), are in conflict with *Peoni* v. *U. S.*, 100 Fed. 2nd 401 (2 C. C. A.); *Koch* v. *U. S.*, 113 Fed. 2nd 982 (2 C. C. A.) and others.

We also contend, that, assuming that the evidence shows that Crossley knew that Fallen did distribute these monies through other defendants and agents on a percentage basis with the additional knowledge that Fallen had purchased the counterfeit money from Paterno, this would not constitute the petitioners co-conspirators within the four corners of the indictment at bar because there is no proof that they actively participated in the objects of the conspiracy as charged in the indictment. There is no proof that the conduct of Fallen in getting Crossley, Roberts, Knight and Van Dien to sell the monies or to dispose of the monies on a percentage basis for Fallen was acquiesced in, known by or participated in by petitioners. There was no aiding and abetting by petitioners in the agreement had between Fallen, Crossley, Knight, Roberts and Van Dien, or that petitioners in anywise acted in concert with Fallen and these other defendants in order to further the object of the conspiracy charged in the indictment. The proofs in the case all showed that there was a conspiracy on the part of Fallen, Knight, Roberts and Van Dien to distribute the counterfeit monies in the Southern District of Florida. If from the evidence it could be reasonably inferred that Fallen and Crossley entered into a conspiracy to distribute the counterfeit monies in Georgia and that the act of Crossley in attempting to sell some of this money to his contact in Cornelia, Georgia, was the overt act, then, if there were a conspiracy petitioners were not a part thereof.

Therefore, for the reasons stated the conspiracy as charged in the indictment was not proven and the learned trial court should have granted petitioners a judgment of acquittal at the end of the Government's case and of the entire case.

As to the Petitioner, Pasquale Masi

The evidence against Masi is comparatively simple. On one of the several visits to Newark, New Jersey, made by Fallen, Fallen expressed his disappointment to Masi in not being able to purchase the counterfeit money from Paterno and that Masi on this occasion said to Fallen that he could print them, if necessary. Fallen frankly admitted that he had no conversation with Masi in the presence of Paterno and Crossley which related to counterfeit money. Further evidence against Masi was that Fallen sent him to buy a brief case which later contained the counterfeit money that Fallen took by airplane with him to Spartanburg, South Carolina. Under the cases which we have cited under this point there is no evidence whatsoever to prove that Masi was a co-conspirator. The best evidence the Government adduced was that he had knowledge of counterfeit activities between Paterno and Fallen but that he did nothing to participate in the conspiracy charged, actively or otherwise. While he may have acquiesced because of this knowledge in purchasing a brief case for Fallen it cannot be said that such acquiescence was in anywise in furtherance of the conspiracy charged in the indictment and that he acted in concert with any of the other alleged conspirators to further the common object of the alleged conspiracy. The law which we have cited, *supra,* to sustain our contention, covers the situation also as to petitioner Masi and his alleged participation in the offense charged.

Applying the principles of law established in conspiracy cases to the facts at bar, the evidence adduced is wholly

barren of any understanding between Paterno, Fallen, Masi, Crossley, and the other co-defendants, of an understanding to accomplish a common purpose. The single design and common purpose charged in the indictment was to distribute and sell the counterfeit monies in the District of Florida.

No testimony was offered at the trial that Fallen, Paterno, Masi and Fallen had hatched any conspiracy in New Jersey. Fallen made several trips to New Jersey to purchase the counterfeit money from Paterno; Masi was no more than a bystander, with knowledge of the sale by Paterno to Fallen, without more. Masi's knowledge was insufficient to make him a conspirator. Paterno's sale to Fallen did not make him a conspirator. Crossley's discussion with Paterno and Fallen did not make him a conspirator in the common design charged in the indictment.

No act of Paterno or Masi was in furtherance of any conspiracy, if any, that Fallen or the others may have formed.

The motions for judgment of acquittal at the end of the Government's case and the entire case should have been granted.

Point II

The learned trial court erred in refusing to charge the jury as requested relating to the principle of law that there cannot be a conspiracy between a buyer and seller, if the facts so convince the jurors.

Petitioner Paterno seasonably submitted in writing the following request to charge (R., pp. 285-286):

> "There is evidence in this case that Fallen went to Newark, New Jersey, met Joseph Paterno there for the purpose of purchasing from Paterno counterfeit money. That Fallen did purchase from Paterno $50,000 worth of counterfeit Twenty dollar bills for which

> he paid Paterno the sum of $11,000 in lawful United States currency. That Fallen induced Knight, Roberts (the fugitive) and Van Dien to sell the counterfeit monies for him on a percentage basis. There has been no evidence offered or produced before you that Paterno had any share of interest in the proceeds which would come to Fallen from the sales or distribution made or to be made by Fallen, Roberts, Knight, Van Dien and Crossley. If you find from all of the evidence that Paterno merely sold the counterfeit money to Fallen and was not to share in any profits made by Fallen, then Paterno is not a co-conspirator and it is your duty to find him not guilty."

The learned trial court refused to so charge and an exception to this refusal was noted (R., p. 274). We respectfully submit that it was the duty of the Court to charge the jurors substantially as requested. A reading of the entire charge by the Court does not reveal that the Court in any way referred to any of the evidence adduced at the trial nor to the principle of law that is contained in our requested instruction. The facts we included in our request to charge were in accordance with all of the evidence. The evidence was that Fallen did purchase from Paterno $50,000 worth of counterfeit $20.00 bills for which he paid Paterno the sum of $11,000 in lawful United States currency. The evidence also shows that Fallen induced Knight, Roberts and Van Dien to sell the counterfeit monies for him on a percentage basis. There was no evidence offered or produced that Paterno had any share or interest in the proceeds which would come to Fallen from the sale and distribution to be made from the sales of counterfeit by Fallen, Roberts, Van Dien, Knight and Crossley.

Our request to charge contained the statement "if you find from all of the evidence that Paterno merely sold the counterfeit money to Fallen and was not to share in

any profits made by Fallen, then Paterno is not a co-conspirator."

The indictment charges a conspiracy among all of the accused to possess and utter counterfeit monies and that in the furtherance of said conspiracy that Paterno had a conversation with Fallen and Crossley with reference to the purchase of counterfeit money (Overt Act 2, R., p. 10).

Again we see in Overt Act 3 of the indictment (R., p. 10) that Crossley and Fallen contacted petitioner Paterno and petitioner Masi and had a conversation with reference to the *purchase* of counterfeit money and that Fallen gave Paterno $1,000 deposit on the delivery of $50,000 worth of counterfeit notes. In Overt Act 4 (R., p. 11) again the fact is charged that Petitioner Paterno delivered to Fallen $50,000 in counterfeit money.

It is elementary that it is the duty of the trial court to charge the jury the law applicable to the case on trial. It is apparent from the face of the indictment that Paterno and Masi were charged with having sold counterfeit money to Fallen. The proofs in the case were exactly as charged in the Overt Acts. No overt act was alleged in the indictment or proven at the trial that Paterno had any understanding or agreement with Fallen or any of the other named defendants to distribute the counterfeit monies, or in sharing in the proceeds from the distribution of the counterfeit monies by Fallen, Roberts, Van Dien, Knight and Crossley.

The principle of law contained in our request to charge is taken from *Peoni* v. *U. S.*, 100 Fed. (2) 401, and *Falcone* v. *U. S.*, 311 U. S. 143. The learned trial court should have charged substantially as we requested and if the learned trial court did not like the language of our request the court could have used such language as it desired *but the principle of law should have been charged.* It was the

theory of the Government's case that Paterno sold counterfeit money to Fallen, and the sale by Paterno to Fallen was an element in the case and essential to show the source of the monies to Fallen. Our request to charge was not so worded as to be an incorrect statement of either the facts or of the law.

In *Grace* v. *U. S.*, 4 Fed. (2) 658, 5 C. C. A., this honorable Court held that "The court is not required to charge propositions of law, however clearly stated, unless the evidence before the jury satisfies them." We respectfully submit that the evidence before the jury justified the learned trial court in instructing the jury as requested. We qualified the facts contained in our written instruction by the use of the words "If you find from all of the evidence, etc."

In the *Peoni* case which we cited under Point I of this brief the principle of law was established that there could not be a conspiracy between the buyer and seller of contraband. Further, in the *Falcone* case, likewise cited and argued under Point I of our brief, the Second Circuit Court of Appeals and the Supreme Court of the United States determined that before one could be held a co-conspirator it would be necessary that the proofs show that he made the venture his own, participated in it and had a stake in the enterprise. The principles of law enunciated in the *Peoni* and *Falcone* cases are included in our requested instruction. The phraseology of our requested instruction was such as to leave the findings of fact to the jury from all of the evidence before it.

In criminal cases the court should instruct on all essential questions of law involved in the case, whether requested or not. *McAfee* v. *U. S.*, 105 Fed. (2) 21, 26; *Kinard* v. *U. S.*, 96 Fed. (2) 522, 534; *Stassi* v. *U. S.*, 50 Fed. (2) 526; 528; *Krein* v. *U. S.*, 11 Fed. (2) 722, 731; *Bruno* v. *U. S.*, 308 U. S. 287, 293; and others.

Petitioner Masi was entitled to the benefit of the requested instruction even though he did not request, in writing or otherwise, the principle of law enunciated in the Paterno request.

The failure of the learned trial court to substantially charge the jury as we requested was harmful, prejudicial and reversible error.

POINT III

The learned trial court erred in the charge to the jury as to the failure of petitioners to testify in their own behalf.

The petitioner Joseph Paterno, in writing, seasonably requested the learned trial court to charge the jury as follows (R., p. 286):

> "Under the laws of the United States, Joseph Paterno has no duty to testify in his own behalf or to offer witnesses in his behalf. He stands before you on his plea of not guilty to this charge of conspiracy. You are not to draw any inference whatsoever because he has not testified in his own behalf or called witnesses in his behalf, and that because he did not take the witness stand, thereby infer guilt. This you cannot do, for he is clothed with the presumption of innocence throughout the course of the trial and it is still the duty of the Government to prove Paterno guilty beyond a reasonable doubt, and if you are not so convinced it is your duty to find him not guilty."

The learned trial court on this point charged the jurors as follows (R., pp. 273, 274):

> "A defendant has the privilege of taking the stand if he so desires, and testifying in his own behalf. They can do that if they wish. They also have the privilege, however, to elect not to take the stand and not to testify, and where, as is the case with some of these defendants that have elected not to take the

> stand and not to testify, that fact should not be taken to their prejudice. That is a privilege that the law gives to them, not to get on the stand."

We respectfully maintain that the learned trial court did not adequately charge the jury and omitted the very essential part of our request "you are not to draw any inference whatsoever because he has not testified in his own behalf or called witnesses in his behalf, and that because he did not take the witness stand, thereby infer guilt."

The statute which is authority for the right of a defendant to not testify and thereby create no presumption against him is the basis for our request to charge. The statute is as follows:

> 28 U. S. C. A. section 632. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (Mar. 16, 1878, c. 37, 20 Stat. 30.)

To be especially noted are the words of the statute "The person so charged shall, at his own request but not otherwise be a competent witness. And his failure to make such request, shall not create any presumption against him." It is to be particularly noted from the language referred to in the statute that no presumption is created because of the failure of a defendant to testify in his own behalf. The statute says nothing whatever about it being a privilege for an accused to testify, for it is always the right of a defendant to testify in his own behalf, if he so elects, which right cannot be denied him. The use of

the word "privilege" as used in the learned court's charge is not contained in the statute, *supra*, and is not in conformity with the substantial rights of an accused. The learned trial court did say that where the defendants do not elect to take the stand that that fact should not be taken to their prejudice. The use of the word "prejudice" did not carry with it the full import of our requested charge or the intent of the statute. The language that the court did use did not give full effect to the intent of the statute because one being prejudiced by his failure to do something is not equal to an inference of guilt which might be drawn by the failure to elect the right to testify in his own behalf.

In *Bruno* v. *U. S.*, 308 U. S. 287, 84 L. Ed. 257, the trial court below gave the following instruction to the jury:

> "It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

Bruno requested this additional instruction:

> "The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

This requested instruction by Bruno was denied by the lower court because the court felt that the request had already been covered. The question before the Supreme

Court was whether Bruno had the indefeasible right to have the jury told in substance what he asked the judge to tell it. Our argument that the learned trial court below committed prejudicial and reversible error by refusing to charge as we substantially requested is substantiated and settled by the eloquent language of the United States Supreme Court in the *Bruno* case, *supra* and which we respectfully adopt and urge upon this Honorable Court, viz.:

> "That Act freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him. The accused could at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him. Such was the command of the lawmakers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict in the facts. Sparf *v.* U. S., 156 U. S. 51, 39 L. ed. 343, 15 S. Ct. 273. By legislating against the creation of any presumption from failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind. It laid down canons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it."
>
> "A subsidiary question remains for determination. It derives from the Acts of February 26, 1919, 40 Stat. at L. 1181, chap. 48, and January 31, 1928, 45 Stat. at L. 54, chap. 14, 28 U. S. C. A., sec. 391 whereby appellate courts are under duty in criminal as well as in civil cases to disregard 'technical errors, defects, or

exceptions which do not affect the substantial rights of the parties.' Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not. It would be idle to predetermine the scope of such a remedial provision as Sec. 391 by anticipating the myriad varieties of rulings made in trial and attempting an abstract, inclusive definition of 'technical errors.' Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him."

"To the suggestion that it benefits a defendant who fails to take the stand not to have the attention of the jury directed to that fact, it suffices to say that, however difficult it may be to exercise enlightened self-interest, the accused should be allowed to make his own choice when an Act of Congress authorizes him to choose. And when it is urged that presumption arise in the minds of jurors against an accused who fails to testify the short answer is that Congress legislated on a contrary assumption and not without support in experience. It was for Congress to decide whether what it deemed logically significant was psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.'"

"We conclude that the substance of the denied request should have been granted, and that the judgment therefore is reversed."

In *Mayer* v. *U. S.*, 259 Fed. 216, 170 C. C. A. 284, the Court held:

> "The fact that the defendants did not see fit to take the stand and deny the charges made against them could not be allowed to rest in the minds of the jurors any inference of guilt."

And also, in *U. S.* v. *Pendergast,* 32 Fed. 198, the Court therein held:

> "There is no presumption of guilt against a defendant merely because he has not taken the stand as a witness in his own favor."

And now petitioner Masi did not submit any written instruction on this point nor does it appear that he excepted to the instruction as given by the learned trial court. An exception was noted in behalf of the petitioner Paterno as to the refusal of the written instruction as requested. However, the failure of the petitioner Masi to make any objection or reserve an exception to the improper instruction given by the learned trial court is not fatal to him for the reason that plain error having been committed the appellate courts, *sua sponte,* will take notice thereof.

In *Filippoine* v. *Albion Slate Co.,* 250 U. S. 76, the United States Supreme Court held:

> "Erroneous rulings, especially in instructions in jury trials, are presumptively injurious and furnish ground for reversal unless it affirmatively appears that they were harmless."

We, therefore, respectfully submit that the learned trial court committed reversible error in refusing to substantially and essentially charge as requested.

Point IV.

The learned trial court erred in refusing to charge the jury that the indictment was not evidence of guilt.

The petitioner Paterno respectfully requested the learned trial court, in writing, to charge the jury as follows (R., p. 281).

> "The jury are instructed as a matter of law, that the indictment in this case is nothing more than a mere formal charge and that the fact that a grand jury has returned the indictment is not to be considered as the slightest evidence of the truth or correctness of any of the allegations made in the indictment, or to the truthfulness of the charge or charges contained therein made. You are further instructed that the indictment, is not the slightest evidence of the defendant's guilt, and that, accordingly, during your deliberations you are not to consider the indictment as evidence against the defendant, or permit it in any manner to weigh against him."

The trial court refused to charge as requested but did charge as follows on this question (R., p. 259):

> "The indictment in this case, gentlemen, is merely a formal charge or accusation against these defendants. It is not evidence and should not be weighed and considered by you as evidence."

The learned trial court did not adequately charge either the language of our request or sufficiently charge as requested. We do not contend that a trial court has the duty to charge the jury in the precise language as contained in our request but we do contend that it is the duty of trial court to adequately and sufficiently charge the applicable principle of law correctly, fully and clearly. It is the substantial right of a defendant to have a request to charge within proper bounds for the purpose of insuring that the

jury be not left to grope with respect to relevant and material evidence. When so requested a trial court is obliged to instruct the jury consonantly, if not in the form of a request, then in the language of the court. The words necessary to impart a germane instruction are for the trial court's choice so long as they are adequate for the purpose, *Quick* v. *U. S.*, 128 Fed. (2) 832 (3 C. C. A.).

The instruction as given to the jurors merely said that the indictment was a formal charge against the defendant; was not evidence and should not be weighed and considered by the jurors as evidence. But the learned trial court did not go far enough. The overt acts in the indictment recited facts. Because of the recital of facts in the indictment the language of our request, *supra,* became most pertinent, germane and relevant and necessary to be stated to the jury so as to make absolutely certain that anything contained in the indictment was not evidence.

The indictment was taken into the jury room and the court directed the jurors as follows (R., p. 271):

> "These overt acts have been described to you. You know what they are. You can consult the indictment again to refresh your memory, if necessary."

This quoted part of the learned trial court's charge came after the Court had instructed the jury that the formation of a conspiracy must be followed by the commission of some one or more of the overt acts charged in the indictment (R., p. 271). We do not contend that it was error for the learned trial court to permit the jurors to take the indictment into the jury room. This was in the sound discretion of the trial court and we make no claim of prejudice because the indictment and the exhibits in the case were with the jurors during their deliberation.

However, it is reversible error for the learned trial court to have refused to charge the essentials of our written re-

quest. Our request contained instruction that the indictment was not to be considered as the *slightest evidence of the truth of any allegations made in the indictment or of the truthfulness of the charges therein made* and that the indictment is not in the slightest evidence of the defendant's guilt and that the indictment should not be considered as evidence or be permitted in any manner to weigh against the defendants. All that the learned trial court did charge was as we have pointed out. This was insufficient.

In *Little* v. *U. S.*, 73 Fed. (2) 861, 10th Circuit, the court held that whether the indictment or exhibits should be taken into the jury room is within the sound discretion of the trial court, if the indictment goes into the jury room the jury should be charged, upon request, that the indictment is not evidence of the facts charged therein. *Capriola* v. *U. S.*, 61 Fed. (2) 5, 10th Circuit.

In *Cooper* v. *U. S.*, 9 Fed. (2) 216, 8th Circuit, the Court was instructed to charge the jury as follows:

> (At page 226) "Defendant's first request was the following: 'The court instructs the jury that the indictment in this case is in itself a mere formal accusation or charge against the defendants, and is not of itself to be considered as evidence of the guilt of the defendants, and no juror should suffer himself to be influenced in the slightest degree by the fact that an indictment has been returned against the defendants.' This instruction was refused, and the charge contained nothing to the same effect. The omission would not constitute reversible error in the absence of a request; but when requested, such an instruction should be given."

The *Cooper* case determines that it is reversible error for the trial court to refuse to charge that the indictment is not evidence of guilt.

In *Gold* v. *U. S.*, 102 Fed. (2) 350 (3 C. C. A.), the court reversed the judgment of conviction upon the ground that the trial court had refused to charge, as requested, that an indictment created no presumption of guilt and further held as follows:

> (At page 352) "Where a timely request is made for instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the case, it is the duty of the court to give them unless covered, by other instructions given or by the general charge, and a non compliance with this duty will necessitate a reversal where it cannot be said that appellant was not prejudiced 5 C. J. S., Appeal and Error, page 1155, sec. 1774 (a). Itow *vs.* U. S., 9 Cir., 223 F. 25; Hendrey et al. *vs.* U. S., 6 Cir., 233 F. 5; Feder et al. *vs.* United States, 2 Cir., 257 F. 694, 5 A. L. R. 370; Kaufmann *vs.* U. S., 3 Cir., 282 F. 776; Cohen *vs.* U. S., 3 Cir., 282 F. 871; Cooper *vs.* U. S., 8 Cir., 9 Fed. (2) 216; Sunderland *vs.* U. S., 8 Cir., 19 F. (2) 202; Nanfito *vs.* U. S., 8 Cir., 20 Fed. (2) 376; Link *vs.* U. S., 10 Cir., 30 Fed. (2) 342; Little *vs.* U. S., 10 Cir., 73 Fed. (2) 861, 96 A. L. R. 889; Rosser *vs.* U. S., 4 Cir., 75 Fed. (2) 498.

In *U. S.* v. *Schanerman*, 150 Fed. (2) 941 the trial court was reversed for the reason that it refused the following requested instruction:

> "You are instructed that the indictment is a mere charge or accusation against the defendant, and is not any evidence of guilt, and no juror in this case should permit himself or herself to be, to any extent influenced against the defendant because of, or on account of the indictment. An indictment is merely the means of bringing a defendant to trial."

At Page 945 of this opinion, the Circuit Court held:

> "Immediately before the jurors retired to deliberate upon their verdict, the court told them what exhibits

they might have for examination in the jury room and added that the indictment may go to their room so they can read it and familiarize themselves with the charge. This procedure fell within his sound discretion, but when the indictment and exhibits in a criminal case are taken into the jury room, the jury should be charged, upon request that the indictment is not evidence of the facts charged therein." Little *vs.* U. S., 73 Fed. (2) 861, 864, 96 A. L. R. 889.

In *Filippone* v. *Albion State Co.*, 250 U. S. 76, the United States Supreme Court held:

> "Erroneous rulings, especially in instructions in jury trials, are presumptively injurious and furnish ground for reversal unless it affirmatively appears that they were harmless."

We respectfully maintain and submit that the learned trial court committed reversible error in refusing to charge as requested.

The petitioner Masi did not submit written instructions. Nor does it appear that any exception was asked by him or allowed. As to the petitioner Paterno an exception was allowed by the trial court (R., p. 274).

We respectfully submit that where the court undertakes to charge a proposition of law it should be charged clearly and fully and so that there could be no miscarriage of justice, for the failure of an accused to take an exception or even make a request for proper charge, our appellate courts have recognized plain error and in this regard plain error has been obviously committed to affect the substantial rights of both of the petitioners.

In *Giles* v. *U. S.*, 144 Fed. (2) 860, the court held that the Court of Appeals will examine the record with reference to an assigned claim of error to which no objection has been made or exception taken in the District Court to see that there has been no miscarriage of justice.

In *United States* v. *Monroe*, 164 Fed. (2) 471, the court held that where no exception is taken to the instruction the court will not consider the alleged error unless substantial prejudice has resulted. *Palmer* v. *Hoffman*, 318 U. S. 109; *United States* v. *Levy*, 153 Fed. (2) 570, 1st Cir., and many others.

In *Benson* v. *U. S.*, 112 Fed. (2) 422, held that appellate courts, under exceptional circumstances, especially in criminal cases where the life or liberty of a defendant is at stake, may, on their own motion, notice errors to which no exception has been taken, if they are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. *U. S.* v. *Atkinson*, 297 U. S. 157, 160.

Further, in *United States* v. *Miller*, 120 Fed. (2) 968, the court therein held that failure of two defendants to request an instruction on character testimony and the failure of all defendants to except to the instruction given *did not* preclude the reviewing court from examining the instruction given.

Therefore, and for all of the reasons herein stated the learned trial court committed prejudicial and reversible error in refusing to substantially charge as requested.

Point V.

The United States Attorney in his closing argument to the jury made the following statements (R., p. 257):

> "Now, getting back to where I was going. You have got this whole picture in the background, of Crossley and Paterno, trading together. They got Fallen in. And, they got his money. And then, when they got his money, Crossley didn't put up his share, or whatever it was he was going to put up. Gentlemen, the underworld has got a saying that when a man is being hooked pretty hard by his confederates, that

they are 'cutting him up.' And I tell you that not only was Crossley, Paterno, Masi and Fallen in that first deal, but they weren't letting him know too much, because they were cutting him up for some of his money, on what it was going to cost to them.

"And, gentlemen, I will state to you that you have got the right, and the Court will so charge you to draw any reasonable inferences from the testimony that you think are justified. Now, I say that Crossley and Paterno are old partners in crime. They operated together before as this record clearly shows——,"

Mr. Calandra: "Your Honor, I respectfully move for a mistrial upon the ground that the remarks of the District Attorney are unwarranted by the evidence and there is nothing in the record here to show that Paterno and Crossley were partners in crime or anything else."

The Court: "Overruled."

Mr. Calandra: "I pray an exception."

This part of government counsel's summation was not based upon the evidence in the case nor any reasonable inference arising therefrom. Counsel's statement "Gentlemen, the underworld has got a saying that when a man is being hooked pretty hard by his confederates, that they are 'cutting him up' . . . but they weren't letting him (Fallen) know too much, because they were cutting him up for some of his money, on what it was going to cost to them . . . Now, I say that Crossley and Paterno are old partners in crime. They operated together before, as this record clearly shows."

Government counsel misquoted the evidence for there was no testimony at all that showed other than that Fallen bought counterfeit money from Paterno; that Crossley introduced Fallen to Paterno. There was no evidence whatsoever that there was any division of the monies between Fallen, Crossley, Paterno and Masi; and that there were

any criminal dealings whatsoever between Crossley and Paterno; or, that Crossley and Paterno had committed any other crimes together; and when the learned trial court was requested to grant a mistrial because of the inflammatory and unwarranted remarks by the United States Attorney the learned trial court did not instruct the jury to disregard the highly objectionable and prejudicial remarks. All the court said was "Overruled" (R., p. 257).

The court in *Maryland Casualty Company* v. *Reid*, 76 Fed. (2) 30, held that:

> "Remarks of counsel to jury on the merits must be objected to at the time, must be unwarranted by pleadings and evidence, and have a tendency to mislead or prejudice jury, and must be more or less approved by trial judge, before judgment will be reversed on ground of improper remarks alone."

We have conformed in every regard with the law of the land. We made a timely motion for a mistrial directing the Court's attention to the prejudicial remarks and the trial court merely said "Overruled" (R., p. 257).

In *Ward* v. *U. S.*, 96 Fed. (2) 189, the Court held:

> "That it is the duty of the trial judge to confine the arguments of a prosecuting attorney within proper bounds."

In *Pierce* v. *U. S.*, 86 Fed. (2) 949, 6 Cir., the Court held:

> "Public interest requires that court of its own motion protect suitors in their right to verdict uninfluenced by appeals of counsel to passion or prejudice."

In *Minker* v. *U. S.*, 85 Fed. (2) 425, the Court held that:

> "It is the Prosecutor's duty not only to use every legitimate means to bring about just conviction, but to refrain from improper methods calculated to produce wrongful conviction."

The above case following the principle established in the Supreme Court of the United States in *Berger* v. *U. S.*, 295

U. S. 78, 88, in discussing the duties and responsibilites of a prosecutor said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

On the same subject, see the discussion contained in *Taliaferro* v. *U. S.* (C. C. A.), 47 Fed. (2) 699; *Turk* v. *U. S.* (C. C. A.), 20 Fed. (2) 129; *Sunderland* v. *U. S.* (C. C. A.), 19 Fed. (2) 202. Also see *Vierick* v. *U. S.*, 318 U. S. 236, 248; *U. S.* v. *Sprengle*, 103 Fed. (2) 876, 884; *Williams* v. *U. S.*, 168 U. S. 382, 398.

Not only did the United States Attorney in the case at bar misquote the testimony but inferred that the petitioners were members of the underworld, arch criminals, vicious and in fact charged them as being such by the language "cutting him up"; "partners in crime"; "underworld".

Our contention is supported by calling Robert M. Hancock, agent of the Secret Service, to testify to matters

wholly unrelated to the indictment at bar and in quoting Crossley as saying to him after the latter's arrest on the instant indictment that he, Crossley, was a crook all his life and three things he would not deal in "is counterfeit money, narcotics, and cars." We could do nothing more than ask for a mistrial. It became the duty of the learned trial court not only to admonish the United States Attorney but to instruct the jury to disregard those remarks in very emphatic, certain and positive language. This the trial court did not do.

Therefore, we respectfully submit the learned trial court committed reversible error in refusing to grant the motion for a mistrial.

We respectfully urge that the questions we have raised are of sufficient importance for this Honorable Court to review, particularly to clarify the law on the important subject relating to whether there can be a criminal conspiracy between a seller and buyer of contraband; and the further question of the duty of a trial court to adequately instruct a jury on the law of the case where the facts warrant a proper instruction, to the end that an accused is given a fair and impartial trial as guaranteed under the Constitution and the laws of the United States of America.

Conclusion

The petitioners respectfully urge that the United States Court of Appeals for the Fifth Circuit and the decisions of other appellate courts are in conflict on the questions raised and that the law should be finally settled and determined by this Honorable Court.

Respectfully submitted,

ANTHONY A. CALANDRA,
Attorney for and of Counsel with Petitioners.